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Supreme Court of the United States

OCTOBER TERM 1947

No. 523

ARTHUR SHILMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION and GRACE LINE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

WILLIAM L. STANDARD,
Attorney for Petitioner.

LOUIS R. HAROLDS,
on the Brief.

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To the Chief Justice and Associate Justices of the Supreme Court of the United States.

The petitioner, Arthur Shilman, respectfully shows to this Honorable Court:

I

Summary Statement of Matter Involved

Your petitioner filed a suit in admiralty in the United States District Court for the Southern District of New York to recover a balance of $200, wages earned while he was employed as a merchant seaman on the S.S. Eli Whitney.

The suit was filed against both the United States of America and the Grace Line, Inc., and was submitted under an agreed statement of facts, under which it was conceded that the vessel was owned by the United States of America and was operated by Grace Line, Inc., pursuant to the same General Agency Agreement as was before this Honorable Court in *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707, 66 Sup. Ct. 1218 (1946), rehearing den. October 21, 1946.

Following an appeal from a decision of the United States District Court, dismissing the suit, the Circuit Court of Appeals for the Second Circuit, on December 4, 1947, ruled that petitioner was entitled to a decree for $200 wages, as against the United States of America, but it dismissed the suit as against Grace Line, Inc., on the ground that the *Hust* decision gave seamen a remedy against the so-called General Agent, as employer, only in tort actions, and not in contract actions.

Having been successful in obtaining a decree against the Government for the full $200 wages involved, we would normally have been content with the result, particularly because of the great volume of work and expense which had been required to obtain a favorable ruling. Unfortunately, however, in dismissing the suit as against Grace Line, Inc., as General Agent, the Circuit Court of Appeals has now set a precedent, repudiated elsewhere, which suddenly jeopardizes countless numbers of seamen's contract cases against such steamship companies, now pending in the various Federal and State Courts—suits which if similarly dismissed as against the so-called General Agent, will in many instances be outlawed by the two-year Statute of Limitations applicable in suits against the Government.

This petition is filed because the decision herein enunciates a doctrine which appears to be in conflict with the reasoning of a decision of the United States Supreme Court (the *Hust* case, supra), and because it involves an

important question of Federal law as to which there is a conflict between the Second and Third Circuit Courts of Appeal, and which has not been, but should be, squarely resolved and settled by this Court.

II

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Tit. 28, U. S. C. Sec. 347).

The decision of the Circuit Court of Appeals in the instant case was rendered on December 4, 1947, and the mandate was entered on December 22, 1947.

III

Questions Presented

1. Where a seaman is employed on a vessel owned by the United States of America and operated by a private steamship company as General Agent, does the seaman have the right to sue the private operating company, the so-called General Agent, for wages earned during the voyage, or is he confined only to a suit against the United States, under the Suits in Admiralty Act?

2. Is the decision rendered by this Honorable Court in *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707, 66 Sup. Ct. 1218 (1946), rehearing den. October 21, 1946, to be construed as limiting the right of seamen to sue the "General Agent", as employer, only in actions based on tort, and as depriving them of that right in actions based on contract?

IV

Reasons for Allowance of Writ

Your petitioner advances the following reasons why this Honorable Court should grant the prayer of his petition:

(a) The decision of the Circuit Court of Appeals for the Second Circuit appears to be directly opposed to the majority opinion, written by Mr. Justice Rutledge, in the *Hust* case, supra, in which this Honorable Court expressly stated as follows at page 719:

> "True, the decision applies specifically only to Jones Act proceedings but it is equally applicable to all other maritime rights and remedies dependent upon existence of the 'employer-employee' relation such as the right to maintenance and cure, etc."

There would appear to be no reason why seamen should be given the right to sue the so-called General Agent, as employer, in tort cases, only to deprive them of that right in contract cases. Particularly should that be true in a seaman's suit to recover earned wages—such wages having always been the subject of special Congressional enactments and judicial pronouncements for the benefit and protection of these "wards of the court".

(b) Further, the decision of the Circuit Court of Appeals for the Second Circuit, in the instant suit, is directly opposed to a decision rendered by the Circuit Court of Appeals for the Third Circuit, entitled *Aird* v. *Weyerhaeuser Steamship Company,* 1947 A. M. C. 1503 (decided September 16, 1947). In that suit the Circuit Court of Appeals for the Third Circuit ruled that a seaman, employed on a ship owned by the United States of America, and operated by a private company pursuant to the usual General Agency Agreement, may maintain his suit against

the private company, as his employer, not only in tort actions, but also in actions arising out of contract.

(c) In reliance upon this Honorable Court's ruling in the *Hust* case, numerous seamen have filed suits solely as against the so-called General Agent, whom they regarded as their employer; and if the decision of the Circuit Court of Appeals for the Second Circuit is to stand, it would mean that hundreds, and perhaps thousands, of small wage, maintenance and loss of personal effects cases, which have been filed against the General Agents in various State and Federal Courts, will have to be discontinued or dismissed. It further means that such suits will then have to be reinstituted by the seamen in the various Federal Courts as against the United States of America under the Suits in Admiralty Act, assuming that they are not barred from doing so by the two-year Statute of Limitations contained therein. In the *Hust* case this Honorable Court stated that it did not intend to bring about any such result, as it felt that the General Agent, as their employer, was amenable to suits by seamen.

(d) There are at the present time pending in the Courts, both Federal and State, throughout the United States, an undetermined and vast number of cases where this question is presented, and until this Honorable Court shall lay down an authoritative determination of that question there will continue to exist a conflict of authority, resulting in conflicting rulings in different parts of the United States interpreting the same Federal law.

(e) The issue presented here involves a Federal question of substance not heretofore squarely determined, but which should be finally passed upon by the United States Supreme Court.

V

For the reasons advanced in the brief supporting this application, your petitioner is advised and believes that the determination of the Circuit Court of Appeals for the Third Circuit properly interprets the law involved, and that the determination of the Circuit Court of Appeals for the Second Circuit, in the instant case, was erroneous, insofar as it held that a steamship company, operating a vessel for the United States under a General Agency Agreement, is not subject to suits by seamen to recover earned wages.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in said Court in the above entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

Respectfully submitted,

ARTHUR SHILMAN,
Petitioner.

STATE OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:
COUNTY OF NEW YORK

WILLIAM L. STANDARD, being duly sworn, says that he is the attorney for ARTHUR SHILMAN, the petitioner herein; that he has read the said petition subscribed by him and that the facts therein stated are true to the best of his knowledge, information and belief.

WILLIAM L. STANDARD.

Sworn to before me this
12th day of January, 1948.

I hereby certify that I have examined the foregoing petition. In my opinion the petition is well founded and the cause is one in which the prayer of the petitioner should be granted by this Honorable Court.

WILLIAM L. STANDARD,
Attorney for Petitioner.

Supreme Court of the United States

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No. .....

ARTHUR SHILMAN,

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THE UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION and GRACE LINE, INC.,

Respondents.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

I

Facts

The petitioner sued in admiralty to recover $200 wages earned by him as a member of the crew of the merchant vessel Eli Whitney. The case was submitted on an agreed statement of facts, which may be summarized as follows:

The S.S. Eli Whitney was owned by the United States and operated by Grace Line, Inc., as agent, pursuant to the usual General Agency Agreement. The petitioner was employed on the vessel as a civilian merchant seaman, and while so employed earned the sum of $406.86 as wages between May 25, 1943 and August 1, 1943.

On or about July 31, 1943, while the vessel was in the Port of Tunisia, North Africa, then an active theatre of war, the petitioner was arrested by personnel of the United States Army on the charge that he had allegedly violated the 93rd Article of War, because he was said to have unlawfully taken an adding machine from the office of the French Navy on July 25, 1943, while he was ashore. On August 2, 1943, he was arraigned and tried in Tunisia upon this charge before a Special U. S. Army Court-Martial. He pleaded not guilty, but was found guilty and sentenced to pay a fine of $200 to the United States and to be confined at hard labor for three months. He served his prison sentence, but never paid the fine. On November 16, 1943, he received from the respondent Grace Line, Inc., $206.86, the amount of his wages, less the fine of $200, to recover which he filed a libel in admiralty, both against the United States and Grace Line, Inc. The respondents filed an answer denying any right of recovery because of petitioner's indebtedness for the unpaid fine to an amount equivalent to the balance of his wages.

The District Judge sustained this defense and rendered an opinion dismissing the libel as against each respondent. From the decree entered on this decision the petitioner appealed.

The Circuit Court of Appeals for the Second Circuit ruled that seamen's wages are protected by special provisions of law, and that petitioner was entitled to a decree for his $200 wages as against the United States of America. However, it dismissed the suit as against Grace Line, Inc., on the ground that the *Hust* decision gave seamen a remedy against the so-called General Agent, as employer, only in actions based on tort, and not in actions based on contract.

II

Errors Relied on and Summary of Arguments Specified as Grounds of Appeal

1. The decision of the Circuit Court of Appeals for the Second Circuit in the instant case appears to be opposed to the decision of this Honorable Court in *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707, 66 Sup. Ct. 1218 (1946), rehearing den. October 21, 1946.

2. The decision of the Circuit Court of Appeals for the Second Circuit in the instant suit is directly opposed to a decision rendered by the Circuit Court of Appeals for the Third Circuit in the case of *Aird* v. *Weyerhaeuser Steamship Company*, 1947 A. M. C. 1503 (decided September 16, 1947).

3. There appears to be no rational reason why seamen should be deprived of the right to sue the General Agent, as their employer, in actions to recover earned wages when this Honorable Court has recognized their right to sue such General Agent, as employer, in actions to recover damages for personal injuries based on tort, in which the right to unearned wages is recognized as part of the measure of damages.

4. Unless certiorari is granted, and unless the decision of the Circuit Court of Appeals for the Second Circuit is reversed, there will continue to be confusion and uncertainty in every case in which a seaman has instituted his suit as against the General Agent, excepting only, perhaps, suits filed to recover damages for personal injuries under the Jones Act. In this jurisdiction in particular, pending suit against the so-called Agent based on contract may have to be discontinued or dismissed if this decision is allowed to stand. These will then have to be reinstituted

against the Government in the various Federal Courts under the Suits in Admiralty Act, assuming such action is not already barred by the two-year Statute of Limitations contained in that Act.

III

The opinion of the Circuit Court below is in conflict with the *Hust* case.

In dismissing the suit as against Grace Line, Inc., the Circuit Court below in the instant case reasoned as follows:

(a) Applying the ordinary rules of agency, the steamship company was merely an agent for the United States, disclosed by the shipping articles as principal, and, therefore, could not be held liable (Transcript of Record, pp. 57-58);

(b) Under the *Hust* decision a steamship company acting as General Agent for the United States "was only held to be subject to the obligations of an employer so as to be liable to seamen in tort for acts of negligence connected with the operation of the vessel" (Transcript of Record, p. 58);

(c) The United States Supreme Court in the *Hust* case did not "decide that the agent was so far the employer as to be liable to the seamen for their wages or other contractual obligations" (Transcript of Record, p. 58).

Let us compare the above reasoning of the Circuit Court in this case with the reasoning of this Honorable Court. We will find that these cannot be reconciled, for, in the *Hust* case, this Honorable Court held in the majority opinion:

(a) The Oregon Court, which had dismissed *Hust's* case, was in error in assuming that "the case would be controlled by the common-law rules of private agency. * * *"

No such application of the common-law control test can be justified in this temporary situation unless by inversion of that wisdom which teaches that "the letter killeth but the spirit giveth life";

(b) Although, for the better prosecution of the war effort, the General Agency Agreement may have made merchant seamen the employees of the United States technically, in fact the private steamship companies carried out the same functions with reference to the ship and crew as they had done formerly. The right of seamen to look to the company as their employer was so well established in law and custom that it was not to be presumed that Congress intended to change this relationship either by the Suits in Admiralty Act or the Clarification Act. To exonerate the steamship companies from liability to their seamen would lead to confusion, and cause many to lose remedies where they had relied on a wrong mode of relief, particularly where the two-year Statute of Limitations contained under the Suits in Admiralty Act had passed. In coming to this conclusion the majority opinion did not consider it necessary to hold that the General Agent was an owner *pro hac vice;*

(c) In order that there might be no misunderstanding as to the broad basis behind the reasoning of the Court, the majority opinion stated, in the *Hust* case, at page 719:

> "True, the decision applies specifically only to Jones Act proceedings. But it is equally applicable to all other maritime rights and remedies dependent upon existence of the 'employer-employee' relation, such as the right to maintenance and cure, etc."

The right to maintenance and cure, of course, is not dependent upon the Jones Act, but arises from the General Maritime Law, and is based on the employment contract.

The Osceola, 189 U. S. 158, 23 Sup. Ct. 485.
Cortes v. *Baltimore Insular Line,* 287 U. S. 367, 53 Sup. Ct. 173, 174.

Aguilar v. *Standard Oil Co. of New Jersey*, 318 U. S. 724, 63 Sup. Ct. 930 (1943).

The right to maintenance and cure includes the right to seek wages till the end of the voyage. And are not rights to claim maintenance and wages among the best established "maritime rights and remedies dependent upon the existence of the 'employer-employee' relation"?

When the majority opinion of the United States Supreme Court in the *Hust* case stated that the decision was intended to apply not only to Jones Act proceedings, but to all other maritime rights and remedies dependent upon the existence of the employer-employee relation, such as the right to maintenance and cure, etc., was that not intended to include a seaman's claim for wages?

It is clear that the Court, in the *Hust* case, realized that its decision would be construed as meaning that seamen are the employees of the operating agent, and that it intended its decision to have that very effect. Any other result would mean that a seaman, suing a steamship company on two causes of action, one to obtain damages under the Jones Act, and the other to obtain maintenance and cure or earned wages, would find one cause of action sustained and the other dismissed, on the ground that he had a wrong party-defendant!

It is respectfully submitted that the reasoning which motivated the decision of the lower Court in the instant case cannot be reconciled with the reasoning which motivated this Honorable Court in its decision in the *Hust* case.

IV

The decision of the Court below is in conflict with a decision of the Court of Appeals of another circuit.

Following the decision in the *Hust* case, seamen's suits based on contract, as well as tort, were filed against the

various steamship companies, which operated vessels for the United States pursuant to General Agency Agreements. It was generally felt this procedure was proper.

However, on June 23, 1947, this Honorable Court rendered an opinion in a case entitled *Caldarola* v. *Eckert,* 332 U. S. 155, 67 Sup. Ct. 1569, and it has now become fashionable for attorneys representing steamship companies to rely upon that case for the purpose of defeating seamen's suits filed against the General Agent. This, despite the fact that the *Caldarola* case had nothing to do with seamen, but merely involved the question whether a person, such as a stevedore, who was employed by a third party, could recover from the General Agent for personal injuries caused by a defective boom. The longshoreman's theory was that, under the *Hust* case, the Agent was to be deemed an owner of the vessel, *pro hac vice.* This Honorable Court pointed out, in ruling against the stevedore's contention, that the majority opinion of the *Hust* case did not hold the steamship company to be an owner, *pro hac vice,* but simply held that a *seaman,* for the reasons already set forth, could look to the Agent as his employer. Unfortunately, in distinguishing the *Hust* case from the situation then before it, this Honorable Court used the following language in the *Caldarola* decision:

> "We there held that under the Agency contract the Agent was the 'employer' of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an 'employer'."

Ever since the use of that language by this Honorable Court steamship companies have been urging that the *Caldarola* case has so limited the *Hust* decision that the latter is only to be applied so as to permit seamen to sue the General Agents as their employer solely in actions to recover damages for personal injuries under the Jones Act.

However, this defense was raised and repudiated, correctly, we think, in *Aird* v. *Weyerhaeuser Steamship Company,* 1947 A. M. C. 1503 (C. C. A. 3rd, decided September 16, 1947). The steamship company there, as in the instant case, attempted to avoid liability to a seaman, who was suing for wrongful discharge, on the ground that the Government, and not the company, was the seaman's employer. In repudiating this contention the Court stated at page 1508:

> "We prefer to take the position that the Clarification Act intended to provide and did provide that the seaman might assert against a private shipowner, serving as General Agent every contract right as well as every tort claim which he could have asserted had it not been for 'the temporary wartime character of his employment.' We conclude, therefore, that Aird has the *locus standi* to maintain his suit against Weyerhaeuser as his employer."

The same result had previously been reached in actions filed in lower State Courts.

Saluk v. *A. H. Bull & Co.,* 1947 A. M. C. 161 (Municipal Court of the City of New York). Action for breach of contract of bailment.

Martinez v. *Marine Transport Lines, Inc.,* 1947 A. M. C. 529 (Municipal Court of the City of New York). Action to recover maintenance and wages. An appeal taken by the steamship company is pending.

In *Warren* v. *U. S. and American South African Line, Inc.* (S. D. N. Y., Ad. 135-171, ... F. Supp. ....., decided December 8, 1947), Judge Medina also had the same question before him in a seaman's suit to recover maintenance from the General Agent which operated the vessel for the Government. The decision of the Circuit Court of Appeals in the instant case, which had only been decided a few days previously, over the week-end, had perhaps not yet

been made known to Judge Medina, and he ruled in favor of the seaman, and against the General Agent, in the following language:

> "The question is whether the general agent is an employer for the purposes of liability for maintenance and cure. The reasoning of the *Hust* case would seem persuasive that it is. Respondent, however, attempts to distinguish that case because it was a suit for indemnity under the Jones Act, whereas this is not.
>
> "I cannot make this distinction. If a general agent is an employer for the purposes of liability in tort under the Jones Act, it does not seem far-fetched to consider him an employer for the purposes of liability for maintenance and cure, that pervasive incident of the maritime contract, *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 371 (1932), antedating the Jones Act by hundreds of years. *The Osceola,* 189 U. S. 158, 169-175 (1903). It would be incongruous to say that the Jones Act has by implication so weakened it as to make it incapable of independent suit. 1 Benedict, Admiralty 258 (6th ed. 1940). There are authorities for this view, both in the Federal, *Broadbent* v. *United States,* 1947 A. M. C. 749 (E. D. Pa. 1947), and State courts. *Moss* v. *Alaska Packers Association,* 70 Cal. App. 2d 857, 160 P. 2d 224 (1945); *Martinez* v. *Marine Transport Line,* 1947 A. M. C. 529 (N. Y. City Municipal Court 1947).
>
> "Nor does *Caldarola* v. *Eckert,* 332 U. S. 155 (1947), require a different conclusion. There a stevedore was injured while working aboard a vessel with respect to which an agent was functioning under the usual General Agent Service Agreement. The general agent had nothing to do with his being hired, as he was the employee of a stevedoring concern under an independent contract with the government. The Supreme Court held that this agreement did not impose upon the agent 'duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States' (332 U. S. at 159). Libellant here is not a business invitee, a third person, but a seaman procured by the general agent under the Service Agreement. He is more like Hust than Caldarola."

The most recent decision on this question is *Healey* v. *Sprague Steamship Co.* (Sup. Ct. N. Y., Index No. 12274-1947, New York Law Journal, 12/23/47, p. 1856). In that case Mr. Justice Steuer refused to follow the decision of the Circuit Court of Appeals in the instant case and awarded an injured seaman maintenance, wages until the end of the voyage, and reimbursement for lost personal effects, although the suit was filed solely against the General Agent in a State Court. Because the decision has not yet appeared in the published reports, we take the liberty of setting forth the most important portion thereof:

> "The gravamen of the decision (Hust) was that prior to the acts by which shipping was acquired by the government, seamen had rights against the operator of the ship and that before the change of their status to government employees, by virtue thereof could deprive them of such rights, there had to be clear statutory authority therefor. The holding is in effect that the agent as regards his tort liability to the seaman is the operator of the ship. A later holding (Calderola v. Eckert, 332 U. S. 155) defined the latter proposition as the holding and specifically determined that it is a matter of state law as to whether the control of the agent is sufficient to impose liability for injuries to business invitees of the ship. As maintenance and cure is an incident of contract and not a statutory right, the Hust case can hardly be controlling. No such question of contract has arisen in the state courts. There have been decisions in the United States courts. In two of them the issue was decided on the question of agency (Shillman v. U. S. and Grace Lines, ... Fed. 2d ....., and Lewis v. U. S. Navigation Co., 57 Fed. 2d 652), the test of liability being whether the agent revealed the agency to the plaintiff. The third decision (Warren v. U. S. and American South African Line, Inc., ... Fed. 2d .....) was based on the fact that despite the origin of maintenance and cure being contractual, its nature was so allied to compensation for injuries that to deny it would be incongruous with the Hust decision. Naturally, it would not be less incongruous if the agency

were revealed, so this decision does not represent an accord with the other two.

"It is difficult to see how the agency principle is at all involved in the question. The contract is the shipping article. It is not signed by the agent company, but by the master (i.e., the captain) of the vessel. He is an employee of the United States and there is nothing in the document to show that he acted, or was authorized to act, in any other capacity. Furthermore to hold on this basis is to mistake the shadow for the substance. The grounds for holding an undisclosed agent as a principal are that by his concealment the agent induces the other party to contract on the agent's responsibility and that in case of breach he prevents the other party from knowing against whom his rights lie. Neither of these grounds exist. In the Hust case the court took occasion to point out how seamen are hired. The agent notifies the union; the latter sends the men to the vessel. In the case at bar it appears in the testimony that the plaintiff gathered no impression from the shipping articles as to who his employer was and only after being assigned to duty on the ship was he told the name of the agent company. So that he was not induced to sign on in the belief that defendant was the other contracting party. As to being unaware of the proper party to sue for a breach, it is true that he may have been unaware of what was general knowledge, viz., that all shipping was in government hands. But no one was better informed of the situation than his attorney and few plaintiffs have been more ably represented. The conclusion is that to answer the question of defendant's responsibility by whether or not the word 'agent' appeared in the shipping articles is sound neither legally nor actually.

"It is true that to deny maintenance and cure in a situation where responsibility under the Jones Act exists would be incongruous. But this is only so where the courts are in the same jurisdiction, conforming to the same pattern of law. When the Calderola case was before the Court of Appeals, that court pointed out that it was unnecessary to the decision to determine whether if the Hust case decided

anything beyond liability under the Jones Act, it should be followed in this state and that question was specifically left open. On the particular question involved here the determination depends solely on the interpretation of the General Agency Contract. On this subject a contract with the United States, the United States Supreme Court is the final arbiter (S. R. A. Inc. v. State of Minnesota, 327 U. S. 558). While the instant conclusion depends on a prediction, arrived at through deduction, as to what two appellate courts will decide, and hence is necessarily tenuous in its nature, no other means is apparent. That conclusion is that a parity of reasoning requires the holding that the General Agency Contract imposes liability on the agent for seaman's maintenance and cure."

On the other hand, apart from the instant case, suits against the General Agent have been dismissed in the following cases on the ground that only the United States of America is the proper party-defendant:

Gaynor v. *Agwilines, Inc.,** (D. C. Pa., decided November 26, 1947). Action to recover wages, maintenance, cure and for lost personal effects.

Anderson v. *United Fruit Co.*, 1947 A. M. C. 340 (Municipal Court, New York City). Seaman's action to recover wages.

There has also been a conflict of opinion, in cases arising in the lower Federal and State Courts, as to whether the *Hust* decision is to be limited to causes of action which arose prior to the adoption of the Clarification Act (March 24, 1943).

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* Although it reached that conclusion, the Court, in the *Gaynor* case, differentiated the *Caldarola* decision from the *Hust* case, in the following language:

"In Caldarola v. Eckert, ... U. S. ..... (decided June 23, 1947), the plaintiff was a longshoreman and since the Clarification Act concerns 'seamen', the Act was of no consequence."

In the *Gaynor* case, supra, the Pennsylvania District Court held that where a cause of action arose subsequent to March 24, 1943, the date of the adoption of the Clarification Act, a seaman's suit arising out of employment on a vessel of this type could only be instituted against the United States of America and not against the General Agent. On the other hand, the following cases hold that the reasoning in the *Hust* case justifies seamen in filing suits against the General Agents, irrespective of whether their causes of action arose prior or subsequent to the adoption of the Clarification Act.

Fink v. *Shepard S. S. Co.*, 1946 A. M. C. 1333 (Oregon Cir. Ct.).

Cohen v. *American Petroleum Transport Corp.*, 1947 A. M. C. 336 (City Court, New York County).

Saluk v. *A. H. Bull & Co.*, 1947 A. M. C. 161.

Martinez v. *Marine Transport Lines, Inc.*, 1947 A. M. C. 529.

Warren v. *U. S. & American South African Line, Inc.* (S. D. N. Y., Judge Medina, Ad. 135-171, decided December 8, 1947) ..... F. Supp. .....

Healey v. *Sprague Steamship Co.* (Sup. Ct. N. Y., Index No. 12274-1947, New York Law Journal, 12/23/47, p. 1856).

From all of the foregoing it at once becomes readily apparent that serious differences of judicial opinion have arisen concerning the effect of this Honorable Court's decision in the *Hust* case. But the most important difference is that which has arisen between the Circuit Court of Appeals for the Third Circuit on the question whether actions against the General Agent, as employer, are to be permitted merely when based on tort, and denied when based on contract.

V

Seamen's wages are in a special category, protected by law, and entitled to liberal interpretations.

Actually, the question raised by this petition is whether seamen's wage suits are to be placed in a less favored category than seamen's personal injuries suits. It is believed that an examination of the authorities on this question can lead to no conclusion but that seamen's wage suits are entitled to as great, if not greater, protection than any other aspect of their rights arising out of the employer-employee relationship.

In *Benedict on Admiralty* (6th Ed., A. W. Knauth) the following is stated at page 282:

> "The character of seamen and the nature of their employment have induced Congress to provide specifically for the collection of their demands. Seamen have always been considered as wards of the admiralty. The wages of their perilous service have been by all nations highly favored in the law. It was the great considerations of policy and justice connected with that humble but most useful class of men that induced the English common law courts to leave to the admiralty the undisputed cognizance of suits for seamen's wages and to make those wages a lien upon the last plank of the ship. A cheap and summary mode has, therefore, been provided, for hearing controversies usually of small amount but of very great importance to the seamen."

Some of the special statutes which were enacted for the protection of seamen's wages were expressly recognized in the decision of the Circuit Court of Appeals below, in ruling that Shilman was entitled to recover his wages against the Government, in the following language:

> "A seaman making foreign voyages is entitled to his pay within twenty-four hours after the cargo is

discharged, or within four days after the seaman is discharged, whichever happens first. Failure to pay without sufficient cause subjects the master or owner to an extra payment of double wages for each day's delay (46 USC 596).

"In port, a seaman is entitled to demand one-half of his unpaid wages, and when his employment is at an end, he must receive the remainder of the wages due. So important did Congress feel this provision was, that the section was expressly made applicable not only to American seamen, but also to foreign vessels in United States harbors (46 USC 597).

"Except as expressly provided by law, a seaman cannot give up any right to wages, or any remedy for the recovery of same, even by agreement (46 USC 600).

"His wages are not subject to attachment or arrestment, even by court action, except that a court is given the limited power to order wages withheld, only for the support of a wife and minor children; and no advance assignment of wages is valid, except for payment of an allotment to a relative, made out in the manner authorized and prescribed by law (46 USC 601).

"Section 682 (46 USC) provides that where a seaman is discharged in a foreign port, it must be in the presence of the United States Consul, and, even before the actual signing off, the master must make 'payment of the wages which may then be due said seaman.'

"Section 683 (46 USC) provides that if the consul fails to require all the wages to be paid to the seaman when there is to be a discharge in a foreign port, the consul himself becomes liable to the United States 'for the full amount thereof'.

"Section 685 (46 USC) requires the consul to make sure that there is paid at the time of discharge all wages which are due (plus extra wages, in the event of certain violations of the seaman's contract).

"The above sections look towards payment to the seaman by his employer, at the termination of the employment, of all of his earned wages, without any deductions except those which are expressly authorized by statute."

Taking cognizance of this legislative scheme, this Court in *Wilder* v. *Inter-Island Navigation Co.*, 211 U. S. 239, 29 Sup. Ct. 58 (1908), ruled that the wage statutes which were enacted to protect seamen, whose improvidence and prodigality had led to legislative provisions in their favor, were to be liberally interpreted with a view to affording them maximum protection.

See also *McDonald et al.* v. *United States,* 292 Fed. 593 (C. C. A. 2d, 1923), where Circuit Judge Manton said at page 594:

> "The courts are accustomed to consider seamen as peculiarly entitled to their protection, and contracts for their services will not be construed with the strictness which obtains at common law. Boulton v. Moore (C. C., 14 Fed. 922). The courts will scrutinize these contracts closely, to ascertain whether any imposition is made on the seamen, and any obscurity, uncertainty, or ambiguity will be resolved in favor of the seamen and against the master."

Finally, seamen's wage claims are so favored in law that they have the highest priority over all other maritime liens, irrespective of time, higher even than maritime tort liens.

> *The William Leishear,* 21 F. 2d 862 (D. C. Md., 1927).

In the light of all the foregoing it would certainly seem "incongruous" to hold that seamen may sue the General Agents to recover damages for personal injuries based on tort (recovering unearned wages as an element of damages), and yet be unable to sue for earned wages because the suit is based on contract, and not tort.

CONCLUSION

A writ of certiorari should issue to the Circuit Court of Appeals for the Second Circuit so that a decision may be obtained on the important question whether merchant seamen, employed on ships owned by the United States of America, and operated by private steamship companies pursuant to General Agent Agreements, may look to these "Agents" as their employers, not only in suits based on tort, but also in suits based on contract. The determination of this question is of great importance in Maritime Law, not only because of the many cases which were filed during, and immediately following the war, but also because the Government has announced its intention of continuing to operate merchant vessels for some time in the future. Lest the rights of many seamen be wiped out completely, it is of the greatest importance that the conflict of decisions should be resolved.

Respectfully submitted,

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